

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 120 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

NABIKHAN HAMIRKHAN SEPOY

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 120 of 1997
MR MC BHATT for Appellant No.
MR KB ANANDJIWALA for Appellant No.
MR RC KODEKAR, APP for Respondent No. 1
MRS SHILPA J UNWALLA for Respondent No. 1
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CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 06/05/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. The appellants have preferred this appeal to challenge the judgment and order of conviction and sentence passed by the learned Addl. Sessions Judge, Banaskantha at Palanpur dated 3rd February, 1997 in Sessions Case No. 117 of 1993. The appellants have been convicted for offence made punishable under sections 302, 307 323, 427, 452, 435, 336, 143, 147 and 148 read with section 149 of the Indian Penal Code [for short 'IPC'] and also for offence under section 135 of the Bombay Police Act. All the appellants have been sentenced to suffer imprisonment for life and to pay fine of Rs.100/= each and in default RI for one year for offence under section 302 read with section 149 of the IPC.

1.1. Appellants no. 4, 8, 1 to 3 and 5 to 7 have been sentenced to suffer imprisonment for life for offence under section 307 read with section 149 of the IPC. Appellants no. 3, 5, 6, 7, 1, 2 and 4 and also 8 have been sentenced to suffer RI for two months for offence under section 323 read with section 149 of the IPC.

1.2. Appellants no. 1 to 8 have been sentenced to suffer RI for two months for offence under section 427 read with section 149 of the IPC. Appellants no. 1 to 8 have been sentenced to suffer RI for two years and to pay fine of Rs.100/- each, in default further RI for one month for offence under section 452 read with section 149 of the IPC.

1.3. Appellants no. 1 to 8 have been sentenced to suffer RI for two years and to pay fine of Rs.100/= each in default further RI for one month for offence under section 435 read with section 149 of the IPC.

1.4. Appellants no. 1 to 8 have been sentenced to suffer RI for one month for offence under section 143 read with section 149 of the IPC.

1.5. Appellants no. 1 to 8 have been sentenced to suffer RI for two months for offence under section 147 read with section 149 of the IPC.

1.6. Appellants no. 1 to 8 have been sentenced to suffer RI for one year for offence under section 148 read with section 149 of the IPC.

1.7. Appellants no. 1 to 8 have been sentenced to

suffer RI for four months and to pay fine of Rs.100/= each in default further RI for one month for offence under section 135 of the Bombay Police Act.

1.8. All substantive sentences are ordered to run concurrently.

1.9. Original accused no. 9 has been acquitted of all the offences with which he was charged.

2. According to the prosecution, the incident took place on 16th May, 1993 at village Karnala in Taluka Vadgam of district Banaskantha. There was a civil litigation going on with regard to installation of door on the back side of the house of Patel Okhabhai Ganeshbhai, who resided in the locality known as Patel Vas. Appellant no. 2 and 5 had objection to this since their houses were situated on the back side of the house of Okhabhai Ganeshbhai. They, therefore, filed a civil suit for obtaining permanent injunction restraining Okhabhai Ganeshbhai from putting up the door. It appears that initially the temporary injunction was granted, but subsequently it was vacated. However, a compromise was arrived at between the parties in the appeal which was preferred to challenge the order vacating the injunction and in the compromise it was agreed by and between the parties that Okhabhai could put the door but he was not supposed to use it till the litigation was over.

2.1. According to the prosecution, in view of this compromise, Okhabhai decided to put up the door and on 16th May, 1993 he called the mason Ramjibhai to start the work. Ramjibhai started the work at about 10.00 a.m. However, he did not get labourers to help him and hence Ramjibhai Okhabhai, Meghajibhai Okhabhai, Kamrajibhai Okhabhai, Ratubhai Kanjibhai, Laxmanbhai Kanjibhai and Kanjibhai Ganeshbhai went to help him. The work was in progress; at that time the first informant went behind his house to answer the call of nature and he saw that some hot exchange of words was going on between the appellants and the mason Ramjibhai and others. He saw that the appellants were armed with weapons. He, therefore, went to them and asked the appellants not to create any trouble and also instructed the mason to stop the work. Accordingly, the appellants stopped the exchange of words and Ramjibhai also stopped the work of construction. It is the case of the prosecution that in the meanwhile, the appellant no. 2 pulled the rope which was tied to the frame of door to keep it erect and broke it. PW Virjibhai Okhabhai caught the hand of appellant no. 2 and asked him not to break the rope but soon

thereafter appellant no. 1 dragged Ratubhai Kanjibhai, the deceased of the case, and took him to the back side of his house. Appellant no. 1 delivered a knife blow on the stomach region of Ratubhai. He, therefore, fell down on the ground. On learning about the assault on Ratubhai, immediately other Patels residing in the said locality rushed there. When Ratubhai was lying on the ground in injured condition, appellant no. 2 delivered a Dhariya blow on his head. Ratubhai started profusely bleeding. Appellant no. 3 caused injury with iron pipe to Kanjibhai Ganeshbhai. In the meanwhile appellant no. 4 delivered a blow with the handle of hand-pump on the back side of the head of PW Kamrajbhai Okhabhai and caused him serious injuries. It is further alleged by the prosecution that appellant no. 6 also assaulted Laxmanbhai Kanjibhai with iron pipe and caused him injury on the head. According to the prosecution, appellant no. 7 was having a hockey stick and he wielded it indiscriminately causing injuries to all, so did appellant no. 5.

2.2. It is the case of the prosecution that since Ratubhai had received serious injuries, he was brought to the house of Okhabhai. He was still in bleeding condition. It is further the case of the prosecution that the appellants thereafter entered the house of Okhabhai Ganeshbhai and went to his compound and from there they started pelting stones. After the incident was over, since Ratubhai Kanjibhai, Kamrajbhai Okhabhai, Laxmanbhai Kanjibhai, Virjibhai Okhabhai and Kanjibhai Ganeshbhai had received injuries, they were removed to Government hospital at Palanpur in the jeep car of Virjibhai Okhabhai. According to the prosecution, Ratubhai breathed his last on his way to the hospital. The first informant Moghajibhai Galbabhai got the injured persons admitted in the hospital and he returned to village Karnala. Ratubhai was declared dead by the doctors at the Civil Hospital. It is the case of the prosecution that after the injured persons were removed to the hospital at Palanpur, back in the village the appellants caused damage to the properties of the Patels. Subsequently the information with regard to the incident was given to the police at Vadgam Police Station, who registered the offence at C.R. No. 19 of 1993 for offences under sections 302, 307, 325, etc. of the IPC and commenced investigation. Appellant no. 1 Nabikhan also approached the police and lodged the FIR against some of the prosecution witnesses. It was registered at C.R. no. 20 of 1993 at Vadgam Police Station. It was for offences under sections 323, 337, 114 of the IPC and under section 135 of the Bombay Police Act.

2.3. On receipt of the complaint, the police commenced investigation and in the course of the same, arrested the appellants and produced them before the concerned Court, which forwarded them to the judicial custody. On completion of the investigation, the police submitted charge-sheet on 13th August, 1993 in the Court of the learned Chief Judicial Magistrate at Palanpur, who in turn committed the case to the Court of Sessions on 7th October, 1993 as offences under sections 302, 307, etc. are exclusively triable by the Court of Sessions.

2.4. At the trial, the learned Judge framed the charge against the appellants and original accused no. 9 Ismail Vali Muman for aforesaid offences on 20th June, 1995. The appellants pleaded not guilty and claimed to be tried.

2.5. The prosecution, to substantiate its case against the appellants, examined 21 witnesses and also produced documentary evidence. After recording of the evidence was over, further statements of the appellants and original accused no. 9 were recorded under the provisions of section 313 of the Code of Criminal Procedure. It appears that no specific defence was pleaded but it was of general denial.

2.6. At the end of the trial, the learned Judge came to the conclusion that the prosecution had been able to prove all the charges against the appellants beyond any reasonable doubt and hence, the learned Judge convicted them for different offences as stated above and imposed different sentences. The learned Judge, however, came to the conclusion that so far original accused no. 9 was concerned, the prosecution had failed to prove its case against him and, therefore, he was acquitted. The appellants have approached this Court to challenge the judgment and order of conviction and sentence passed against them.

3. We have heard Mr. KB Anandjiwala, learned advocate for the appellants and Mr. RC Kodekar, Ld. APP for the respondent - State. We have also permitted Mrs. Shilpa J Unwala, learned advocate for the original complainant to address us. Mr. Anandjiwala has submitted that the conviction of the appellants for offences under sections 302, 307, etc. read with section 149 of the IPC is erroneous. He has submitted that the prosecution has suppressed the true facts regarding the origin of the incident and, therefore, on that sole ground its case should fail. He has further submitted

that looking to the facts of the case there was every possibility that the appellants were attacked first and they had exercised their right of private defence in causing injuries to the prosecution side. In the alternative he has submitted that it is a case of free fight where everybody is liable for his individual act and the conviction of the appellants with the aid of section 149 and section 34 of the IPC is erroneous. Lastly, he has submitted that except appellant no. 1 rest of the appellants were on bail pending trial and even after their conviction, pending final disposal of the appeal they have remained on bail and execution of their sentence has been suspended. In view of the same, it will not be desirable to send them behind bar after a lapse of 12 years.

3.1. As against that, Mr. Kodekar has supported the judgment. He has submitted that considering the facts and circumstances of the case, it is very clear that the appellants had made all the preparations to assault the prosecution side and on the day of incident they actually armed themselves with lethal weapons and attacked the prosecution witnesses and the deceased and caused them serious injuries. In his submission, the appellants have been rightly convicted for various offences with the aid of section 149 of the IPC. He has submitted that the appeal of the appellants deserves to be dismissed.

3.2. Mrs. Unwala, learned advocate for the complainant has submitted that the evidence on record does not show that it was the prosecution side which attacked first and, therefore, the appellants had a right of private defence. She has submitted that when Okhabhai Ganeshbhai was constructing the door in accordance with the terms of the compromise, there was no need for the appellants to go there armed with weapons and assault various persons. She has further submitted that the very fact that the appellants had received minor injuries shows that they themselves were aggressor and they have been rightly convicted by the trial Court for different offences.

4. With a view to reappraise the evidence we have carefully gone through the record of the case. We have also carefully considered the submissions of the learned advocates. It is clear from the record that there was some dispute going on with regard to putting up of the rear door by the Patels between them and the appellants since long. There was civil litigation going on between the parties on account of it. It also appears that there was some heart burning on the side of the prosecution

because of the objection raised by some of the appellants for grant of piece of land to the Patels by the panchayat. In this background of the hostility, the present incident took place. It appears that pursuant to the compromise that had been arrived at between the parties that Okhabhai Ganeshbhai had commenced the work of putting the door on the back side of his house and for that he had called mason Ramjibhai. He had started the work around 10.00 a.m. It is the case of the prosecution that since labourers were not available, certain persons namely, Kanjibhai Ganeshbhai, Ratubhai Kanjibhai, Laxmanbhai Kanjibhai, Virjibhai Okhabhai, etc. were helping the mason. When the appellants came there, the present incident thereafter took place.

4.1. Prosecution has examined PW 2 - Moghajibhai Galbabhai Patel at Exh. 31. He has stated in examination-in-chief that the incident took place on 16th May 1993 at about 10.0 to 10.30 a.m. He has stated about the litigation that was going on between the parties. On the day of incident he had gone in the chowk situated behind his house for urinating and at that time he saw that near the house of Okhabhai the appellants were having some altercation with the deceased and some of the members of the prosecution side. He, therefore, went there and asked the appellants to keep quiet and asked mason Ramjibhai to stop the work. They did so. He has further stated that there after appellant no. 2 pulled the rope which was tied to the door and broke it. He also threw the frame of the door on the ground. Immediately appellant no. 1 pulled the deceased Ratubhai and dragged him to some distance and thereafter he delivered a blow on his stomach with knife. As a result thereof, Ratubhai fell on the ground. Appellant no. 2 delivered a blow with Dhariya on the head of Ratubhai while he was lying on the ground. The witness has further stated that appellant no. 4 delivered a blow on the head of PW Kamrajbhai Okhabhai with handle of the hand-pump and appellant no. 1 delivered stick blows to Virjibhai Okhabhai on his stomach. He has also stated that appellant no. 6 was having pipe and he delivered a blow on the head of Laxmanbhai Kanjibhai and appellant no. 3 who was having a piece of iron pipe caused injuries to Kanjibhai. The witness has further stated that appellant no. 7 was having hockey in his hand and he wielded it at random causing injuries to all. Appellant no. 5 who was having iron rod in his hand also caused injuries to all by wielding it at random. The witness has further stated that he went near Ratubhai who was profusely bleeding and was unconscious. He was thereafter taken to the terrace of the house of Laljibhai

Ganeshbhai. At that time the appellants started pelting stones. The witness has further stated that since Ratubhai, Kamrajbhai, Laxmanbhai and Virjibhai had sustained serious injuries, they were taken to the Government hospital at Palanpur. However, Ratubhai expired on his way to hospital. The witness has also stated that he went in the jeep car to Vadgam Police Station and informed the Police Inspector that there was likely to be more trouble at village Karnala and, therefore, he should immediately reach there and arrange for the Bandobast. He has also stated that when he went back to Karnala, he saw the appellants had also caused damage to the properties of the Patels. In the cross-examination by the defence he has stated that when he went to Vadgam he did not go for lodging FIR because he was in hurry. He has, ofcourse, stated that he realized that in such case the complaint should be given immediately but since he was in a haste, he did not give it. He has further stated that at the Vadgam Police Station he did not reveal the entire incident to the concerned Police Inspector Mr. Gorkha, but he only stated that there was a fight between Patels and Sepoys. He has also stated that when the Inspector asked him whether anybody was injured in the incident, he had informed him that Ratubhai had expired and Kamrajbhai and others had received injuries and Kamrajbhai's condition was serious and he was admitted in the Palanpur hospital. He has also stated in the cross-examination that when the Sepoys and Patels pelted stones at each other, he was there in the crowd. However, the witness has further stated that when the Sepoys pelted stones he was not there. He has further stated that when the incident was about to be over Daljibhai came there and Daljibhai, Ramjibhai Okhabhai and Laxmanbhai Kanjibhai started pelting pieces of bricks at the Sepoys. The crowd had gathered on the road near the house of appellant no. 2. He has also stated that at the time when the incident was going on, there were 8 appellants, 6 Patels and 2 others, namely Ramjibhai and Laxmanbhai and they were in the circle of 20 ft. He has also stated that when Ramjibhai Okhabhai and Laxmanbhai threw stones at the Sepoys, only thereafter Sepoys beat the Patels and Laxmanbhai. He has, however, immediately stated that when the aforesaid three persons pelted stones at the Sepoys, they did not retaliate. The witness has denied the suggestion made by the defence that initially a complaint was registered at Vadgam Police Station at C.R. No. 19 of 1993 against the appellants. But since it was not convenient to the Patels, it was entirely changed. From the evidence of this witness, it also appears that there was some dispute with regard to the proposed allotment of a piece of land

to Kanjibhai Ganeshbhai. The witness has, however, showed his ignorance about such dispute.

4.2. PW 3 - Kamrajbhai Okhabhai Exh. 33 is the person who had received injuries. He has stated that on the day of incident the door was to be installed and at that time he, Kanjibhai Ganeshbhai, Ratubhai Kanjibhai, Laxmanbhai Kanjibhai, Virjibhai Okhabhai and Ramjibhai Okhabhai were present. For doing the masonry work one Ramjibhai was engaged. He has further stated that at that time the appellants arrived there with weapons. According to him, appellant no. 2 was having Dhariya, appellant no. 7 was having hockey, appellant no. 5 was having iron rod, appellant no. 8 was having stick and knife, appellant no. 4 was having handle of hand-pump, appellants no. 6 and 3 were having iron pipe and appellant no. 1 was having knife. He has stated that all the appellants came there and threatened to stop the work. Hence the masonry work was stopped. He has further stated that appellant no. 2 broke the rope which was tied with the frame of the door to keep it erect. In the meanwhile appellant no. 1 dragged deceased Ratubhai upto some distance and gave him a blow with knife on his chest. At that time appellant no. 4 gave a blow on his head with the handle of the hand-pump and appellant no. 8 gave blow on his stomach with knife. According to the witness, he fell down on the ground and thereafter he became unconscious. When he regained consciousness, he was lying in the hospital of Dr. Rupesh Mehta at Ahmedabad. He thereafter, learnt that Ratubhai Kanjibhai had expired and other injured persons viz. Laxmanbhai and Kanjibhai were admitted in the Civil Hospital at Palanpur. In the cross-examination by the defence, he has admitted that part of his police statement was recorded on the basis of the information he had received from others. He has further stated that when his dying declaration was recorded by the Magistrate, his brother Meghrajbhai was with him. He has further stated that the deceased Ratubhai was dragged upto a distance of about 8 to 10 ft. and at that time Ratubhai was resisting the dragging. He has further stated that when Ratubhai was assaulted, he did not try to intervene or save him because Ratubhai died almost instantaneously. He has stated that he had seen appellant no. 1 giving only one blow on the chest of the deceased. He has denied that before the Executive Magistrate he had stated that repeated blows were given by appellant no. 1 on the chest of Ratubhai.

4.3. Apart from these witnesses, the prosecution has also examined PW 5 -Becharbhai Shantabhai at Exh. 42, PW 6 - Laxmanbhai Kanjibhai at Exh. 43, PW 7 Meghrajbhai

Parthibhai at Exh. 44, PW 14 - Kanjibhai Ganeshbhai at Exh. 94 and PW 15 - Ramjibhai Okhabhai at Exh. 96, who were witnesses to the incident. Their version is almost on the same line. Hence, their evidence is not reproduced in detail here. They, however, involve the appellants in the assault on the Patels. PW 5 Becharbhai Shantabhai has stated that appellant no. 1 gave knife blow on abdomen of the deceased. PW 6 Laxmanbhai Kanjibhai has stated that appellant no. 1 gave knife blow on the chest of the deceased. PW 7 Meghrajbhai Parthibhai has stated that appellant no. 1 gave knife blow on abdomen of the deceased. PW 14 Kanjibhai Ganeshbhai has stated that appellant no. 3 gave pipe blow on the left shoulder of the witness. PW 15 Ramjibhai Okhabhai has stated that appellant no. 1 gave knife blow on the chest of the deceased. PW 12 Virjibhai Okhabhai has also stated that appellant no. 1 gave knife blow on the chest of the deceased.

5. The aforesaid evidence of the prosecution witnesses, therefore shows that there was incident involving Sepoys on one hand and the Patels on the other. According to the prosecution, it was the Sepoys i.e. the appellants who were aggressors and they have caused serious injuries to the Patels. As a result of that one of them, namely Ratubhai expired. The medical evidence brought on record in the form of oral evidence of the concerned Medical Officers as well as the post mortem notes and the medical certificates clearly shows that there were serious injuries suffered by the members of the Patel community. The post mortem notes have been produced by Dr. Kishanlal Ramjibhai Solanki PW 4 Exh. 34. He has also examined Laxmanbhai Kanjibhai, Kamrajbhai Okhabhai, Virjibhai Okhabhai and Kanjibhai Ganeshbhai. He had performed the post mortem examination of the body of Ratubhai Kanjibhai. The post mortem notes are brought on record and they are at Exh. 40. So far the medical certificates are concerned, the certificate of Laxmanbhai Kanjibhai is at Exh. 36, certificate of Kamrajbhai Okhabhai is at Exh. 37, certificate of Virjibhai Okhabhai is at Exh. 38 and certificate of Kanjibhai Ganeshbhai is at Exh. 39. Laxmanbhai had sustained the following injuries :-

- (1) CLW on occipital parietal junction about 4 c.m.
x 2 c.m., bone deep, bleeding was from the wound.
Oblique in direction.
- (2) Linear incised wound was on ant. abd. (Rt) side
obliquely, skin deep.

Kamrajbhai had Laxmanbhai had sustained the

following external injuries :-

- (1) A stab wound over Ant. aspect of (Rt) lower chest, cavity deep, obliquely extending downwards, about 4.1/2 c.m. x 2.1/2 c.m. in size. There was bleeding from the wound. Margins of the wound were inverted.
- (2) CLW on Mid. parietal region about 3 c.m. x 2 c.m. bone deep, bleeding was present.

The medical certificate also shows that there was internal injury as follows :-

- (Rt) lobe of liver was incised on Ant. Sup. surface, about 5 c.m. x 2.5 c.m., fresh bleeding was there with hemoperitoneum, Abdominal cavity was full with blood.

Virjibhai Okhabhai had Laxmanbhai had sustained the following injuries :-

- (1) An incised wound on Ant. aspect of abdomen, obliquely in direction about 8 cm. x 1/2 cm. in size, skin deep. Bleeding was present.
- (2) Tender swelling on Lt. lateral chest, radish in colour.
- (3) Diffuse tender swelling on Lt. Temporal region.

Whereas Kanjibhai Ganeshbhai had sustained the following injuries :-

- (1) Small contusion on Ant. aspect of Lt. shoulder.
- (2) Diffuse tender swelling Ant aspect of Lt. chest.

5.1. The deceased had suffered three external injuries. They are as under :-

- (1) A stab wound on Ant. aspect of chest Lt. side in the 6th and 7th intercostal space. Transversely at the level of Ant. Axillary line, just below the Lt. nipple, 6th rib was cut, cavity deep, about 4.1/2 cm. x 2.1/2 cm., skin of surrounding wound was fresh (i.e. within 6 hours). Wedge shape wound, margins were inverted.
- (2) Abrasion on both cheeks was present.
- (3) An incised wound on occipital region about 3.1/2 cm. x 2.1/2 cm. bone deep, clotted blood is present. (Fractured) 6th rib Ltd. (six rib was cut).

In the opinion of the witness, the death was due to shock and haemorrhage due to injuries received.

5.2. So far Kamrajbhai is concerned, he was referred to Ahmedabad hospital as already stated above. Kamrajbhai was admitted in the hospital of Dr. Rupesh B Mehta PW 13 Exh. 91. He has issued medical certificate in respect of Kamrajbhai, which is at Exh. 93. He was admitted in the hospital of the witness on 17th May, 1993 and he was discharged from it on 23rd July, 1993. Thus, Kamrajbhai had been in the hospital for almost about 57 days.

5.3. The aforesaid medical evidence shows that Ratubhai had died homicidal death and that too due to the injuries received at the hands of appellant no. 1; whereas the other persons had received serious injuries for which treatment was given at Palanpur and in the case of Kamrajbhai even at Ahmedabad. It is also obvious from the facts of the case that these injuries were received in the incident which had taken place at village Karnala on 16th May, 1993 wherein the appellants as well as Patels were involved.

6. The important question that is required to be decided is whether the prosecution has been able to prove that the appellants had formed unlawful assembly with a common object to either commit murder of the members of the Patel community or to cause them serious injuries.

6.1. The oral evidence discussed above and in particular that of the complainant shows that there was a long standing dispute between these two groups on account of putting up of a door on the rear side house of Okhabhai Ganeshbhai. There was civil litigation going on in respect of such dispute. It also appears that there were certain other disputes existing between the parties. Ultimately all these disputes culminated into the incident where the Patels as well as the appellants received injuries. The injuries suffered by some of the appellants have been brought on record by producing the medical certificate issued by doctor who treated them and who was examined as defence witness. He is Dr. Vikrambhai Avardan Ghadvi DW 1 - Exh. 167. He had examined appellant no. 1, appellant no. 4, appellant no. 3, appellant no. 2 and appellant no. 8.

6.2. He has also produced the medical certificate of appellant no. 1 at Exh. 169, which shows that he had suffered the following injuries :-

- (1) Abrased contusion about 4.00 cm x 2.00 cm in size over the place over the lat. reoppet of Rt. upper arm.
- (2) Linear oral C.L.W. 2.00 cm x 1.00 cm in size deep upto the upper layer over the Rt. side of forehead.

6.3. He has produced medical certificate of appellant no. 4 at Exh. 171, which shows that he had sustained the following injuries :-

- (1) infected (septic) wound over the Rt. parietal area of scalp - scalp deep, about 4.00 cm. x 1.00 cm. in size.
- (2) Oblique infected (septic) wound over the Rt. side of forehead 3.00 cm. x 1.00 cm. in size.
- (3) Diffuse swelling (hematoma) over the Lt. auxiliary area of face.
- (4) C/o pain over the Lt. scapular area.

6.4. He has produced medical certificate of appellant no. 3 at Exh. 172, which shows that he had sustained the following injuries :-

- (1) infected wound over the lower part of omedial ovnet of little finger of Lt. hand in slave the web straces between the little & ring finger about 2.00 cm. x 1.00 cm. in size.
- (2) Diffuse swelling over the auxiliary area of Lt. side of face (hematoma) about 4.00 cm x 3.00 cm in size.
- (3) Infected wound 3.0 cm. x 2.00 cm. in size over the Rt. parietal area of scalp over Rt. to auxiliary of scalp.
- (4) O.T.S. over the dorsal aspect of Rt. hand.
- (5) Oral abrasion about 2.00 cm. x ..00 cm. in size over the Lt. scapular area.
- (6) Oral abrasion over the Lt. side of thyroid area of neck.

6.5. He has produced medical certificate of appellant no. 2 at Exh. 173, which shows that he had sustained the following injuries :-

- (1) Infected wound vertical on stab about 3.00 cm. x 0.50 cm. in size over the Lt. parietal area of scalp just Lt. to midline of scalp.

6.6. Lastly, the witness has produced medical certificate of appellant no. 8 at Exh. 174, which shows that he had sustained the following injuries :-

- (1) Diffuse swelling over the Lt. side of forehead.
- (2) Oral abrasion about 1.00 cm. x 0.50 cm. in size over the pitea of Lt. ear.
- (3) Pt. C/o. pain over the Lt. side of chest.

6.7. The evidence of defence witness along with the medical certificates shows that the otherside i.e. the appellants had also received injuries. No proper explanation has been rendered by the prosecution how these injuries were suffered by the appellants. It clearly appears that these are not self-inflicted injuries and the appellants have suffered them in this very incident. The evidence of the complainant and even that of Kamrajbhai shows that at the time when the work of erecting the door was going on, several persons who ultimately received injuries and one of them died had gathered at that place. It is tried to be explained by the prosecution witnesses that since there was no-one to help the mason, these people were there to help him. Such story cannot be believed. A mason would not need the help of 7 to 8 persons for putting up a door and that too when he was summoned to do work at the house of one of them. The purpose for which they had gathered there appears to be obvious. It can safely be presumed that the members of the Patel community wanted to construct a door and use it at any cost. No-doubt that there is evidence to show that a compromise was arrived at at the stage of appeal over the order passed below Exh. 5 and in the appeal a settlement was arrived at whereby the parties had decided that Okhabhai could put up the door on the back side of his house, but he should not use or open it till the entire litigation was over. It is a matter of common knowledge that a civil litigation would take years to get concluded and no-one would erect the door and then allow it to remain unused till the litigation is over. It also appears that the appellants had sensed the idea of the Patels and, therefore, they had also got themselves ready to see that the terms of the compromise are not flouted. It is difficult to understand that when there was a compromise in aforesaid terms whether there was any necessity for the Patels to construct the door and allow it to remain unused for years to come and whether it was proper for the appellants to prevent them from doing it. When both the sides appear to be at fault despite the compromise having been arrived at between them, it could be presumed that they knew the real intention of each other. When this is so and when the facts of the case reveal that there were injuries suffered on both the sides, the possibility of a free fight between the two groups cannot be ruled out.

In fact the evidence of complainant shows that the stone pelting was from both the sides. In fact at one place in his evidence the first informant has said after Patels pelted stones Sepoys beat them. He has of-course changed his version immediately, but fact regarding pelting of stones by Patels appears to be undisputed. The prosecution has, therefore, not presented the correct facts with regard to origin of the incident. When that fact is not coming on record or it is doubtful, it is difficult to see who was the aggressor. If that be so, it cannot be concluded that it was the appellants who came all prepared and assaulted the prosecution side and caused them serious injuries. It is true that compared to the injuries suffered by some of the appellants, the injuries suffered by the deceased and injured witnesses are quite serious and in one case they even proved fatal. However, the origin of the incident, considering the facts on record, cannot be accepted in toto or in the manner it has been put by the prosecution. Besides incident has taken place near the house of appellant no. 2. This shows that both the sides may have indulged almost simultaneously into the act of fighting and the side of the appellants proved more powerful and it inflicted serious injuries on the prosecution side. But that would not conclusively establish that it was the appellants who committed aggression and caused injuries to the deceased and other injured witnesses.

7. In view of the aforesaid discussion, in our opinion, the learned trial Judge has committed error in holding that the appellants had formed unlawful assembly with a common object to cause fatal or serious injuries to the prosecution witnesses. In our view, the prosecution has failed to make out a case under section 149 of the IPC.

8. The next question that would arise for consideration would be for what offences the appellants could be convicted. It is obvious that when the Court has come to the conclusion that there was a sudden fight and there was no unlawful assembly formed by the appellants with the common object to commit murder and/or cause serious injuries to the members of the prosecution side, every appellant would be liable for his individual act and everybody cannot be convicted for the principal offence with the aid of section 149 of the IPC.

8.1. We are informed by the learned advocate for the appellants and even by Mrs. Unwala, learned advocate for the complainant that appellant no. 1, who has been sentenced to suffer imprisonment for life and who has not

been released on bail by this Court during pendency of his appeal, has served out the sentence and he is now no more in the prison. He is alleged to have caused fatal injury to deceased Ratubhai. In the opinion of the Medical Officer who performed the autopsy, the injuries suffered by deceased Ratubhai were sufficient in ordinary course of nature to cause his death. The post mortem notes show that he had died because of shock and haemorrhage due to injuries suffered by him. The prosecution witnesses also attribute the fatal injuries that had been caused to the deceased to appellant no. 1. He is, therefore, rightly convicted by the trial Court for offence under section 302 of the IPC. We confirm that finding and the ultimate conclusion of the trial Court vis-a-vis appellant no. 1.

8.2. So far appellant no. 2 is concerned, he is alleged to have caused injury on the head of deceased with Dhariya. Though Dhariya is dangerous weapon, the injury caused by appellant no. 2 to the deceased is a simple injury. He, therefore, can be convicted for offence under section 324 of the IPC.

8.3. So far appellant no. 3 is concerned, he has delivered a blow with pipe on the shoulder and head of Kanjibhai. The injuries suffered by Kanjibhai are simple in nature. However, the same have been caused with iron pipe, which is a dangerous weapon. He, therefore, can be convicted for offence under section 324 of the IPC.

8.4. So far appellant no. 4 is concerned, he is alleged to have delivered a blow with the handle of the hand-pump on the head of Kamrajbhai Okhabhai. The injuries suffered by Kamrajbhai are simple in nature. However, the weapon used can be termed as dangerous weapon since it is an iron handle attached to the hand-pump for drawing water. He also can be convicted for offence under section 324 of the IPC.

8.5. So far appellants no. 5 and 7 are concerned, though they are stated to have armed themselves with iron rod and hockey respectively and they are stated to have wielded them indiscriminately causing injuries to all, the evidence of the prosecution cannot be accepted because the prosecution witnesses have described the incident in detail, meaning thereby they had attributed the authorship of injuries suffered by the prosecution witnesses precisely and they could have as well done it for these appellants also, but their statements vis-a-vis appellants no. 5 and 7 are too vague and general and the

same cannot be accepted. Appellants no. 5 and 7, therefore, can be given benefit of doubt.

8.6. So far appellant no. 6 is concerned, he is alleged to have given blow with iron pipe on the back of head of Laxmanbhai Kanjibhai. The medical evidence shows that the said injury is a simple one. However, considering the fact that he was armed with iron pipe, which is a dangerous weapon, he can be convicted for offence under section 324 of the IPC.

8.7. So far appellant no. 8 is concerned, he has caused injuries on the stomach of the prosecution witness Kamrajbhai with knife. He has caused him serious injuries for which he was required to be hospitalized for almost 57 days. When that be so and when he was unable to follow his normal pursuits, in our opinion appellant no. 8 can be saddled with the liability of committing offence made punishable under section 326 of the IPC. Thus, the conviction of appellants no. 2 to 8 for offence under section 302 read with section 149 is erroneous and it is quashed and set aside. The appellants have also been convicted for offences under section 427 for causing damage to the properties of the members of the Patel community. However, there is no reliable evidence on record to show that this damage was caused in the course of the present incident by all the appellants or any of them. When the appellants are to be held liable for their individual acts and when it is not coming on record which of the appellants caused this damage to the properties, their conviction under section 427 of the IPC cannot be sustained. It is, therefore, quashed and set aside.

8.8. So far the conviction of the appellants under section 452 of the IPC is concerned, it is difficult to accept the story of the prosecution that after assaulting and causing injuries to the prosecution side, they subsequently entered the house of Okhabhai Ganeshbhai and thereafter pelted stones at the members of the Patel community. Hence, we do not agree with the conclusion drawn by the trial Court that the appellants have committed an offence under section 452 of the IPC. We, therefore, quash and set aside the said finding and quash the order of sentence imposed for the same.

8.9. So far the offences under sections 143, 147, 148 read with section 149 of the IPC are concerned, the learned Judge has found them guilty and has imposed various sentences as described in the operative portion of the judgment. For the foregoing reasons we have held

that there was no unlawful assembly nor was there any common object amongst the appellants to commit a particular offence. Hence we do not agree with the conclusion of the trial Court on that count. The said finding is, therefore, quashed and set aside and consequently the order of sentence for these offences is also quashed.

9. Thus, so far appellant no. 1 is concerned, we are in agreement with the trial Court that he has committed offence under section 302 of the IPC and, therefore, sentence imposed by the trial Court of imprisonment for life is just and proper. We do not disturb the orders of conviction and the sentence. It is stated at the bar that he has already served out his sentence and he is now out of the prison. He is, therefore, not required to surrender to the custody. Appellants no. 2 to 8 were released on bail pending hearing and final disposal of the appeal and at present they are on bail.

9.1. Orders of conviction and sentence passed by the trial Court for the offences under section 302 read with section 149 of the IPC against appellants no. 2 to 8 and for offences under sections 307, 323, 427, 452, 435, 336, 143, 147 and 148 read with section 149 of the IPC against the appellants no. 1 to 8 are quashed and set aside.

9.2. So far appellants no. 2 to 4 and 6 are concerned, as stated above, each one of them is convicted for offence 324 of the IPC and each one of them is sentenced to suffer RI for six months and to pay fine of Rs.10,000/= [Rupees ten thousand only], in default to suffer further RI for three months. If the fine is paid, the injured prosecution witnesses, namely PW 12 - Virjibhai Okhabhai, PW 6 Laxmanbhai Kanjibhai and PW 14 - Kanjibhai Ganeshbhai are ordered to be paid a sum of Rs.10,000/= each [Rupees eight thousand only] from the total amount of fine that may be paid by the appellants no. 2 to 4 and 6 by way of compensation after due verification by the trial Court. If the full amount of fine is not received, the trial Court shall proportionately reduce the amount payable to aforesaid injured witnesses.

9.3. So far appellants no. 5 and 7 are concerned, they are acquitted of the offences with which they are charged by giving benefit of doubt. Their bail bonds shall stand cancelled.

9.4. So far appellant no. 8 is concerned, he is

convicted for offence under section 326 of the IPC and he is sentenced to suffer RI for three years. He is ordered to pay a fine of Rs.15,000/= [Rupees fifteen thousand only], in default further RI for one year and six months. If the fine is paid, Rs.10,000/= [Rupees ten thousand only] to be paid to Prosecution Witness No. 3 Kamrajbhai Okhabhai after due verification by the trial Court.

9.5. The appellants no. 2 to 4, 6 and 8 are granted time of three months from the date of the judgment to surrender and to pay the fine before the trial Court.

9.6. The appellants no. 2 to 4, 6 and 8 are on bail. Upon surrender to the prison, their bail bonds shall stand cancelled.

In view of the aforesaid, the appeal is partly allowed.

Muddamal articles to be disposed of in accordance with the direction of the trial Court.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.

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